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IN THE

Supreme Court of the United States

DAVID A. ZUBIK, *ET AL*, *Petitioners*,

v.

SYLVIA BURWELL, *ET AL.*, *Respondents*.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *ET AL*, *Petitioners*,

v.

SYLVIA BURWELL, *ET AL.*, *Respondents*.

On Writ of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth & D.C. Circuits

Brief *Amicus Curiae* of U.S. Justice Foundation, Eberle Communications Group, Public Advocate of the U.S., Citizens United, Citizens United Foundation, Conservative Legal Defense and Education Fund, Institute on the Constitution, Policy Analysis Center, Southwest Prophecy Ministries, Daniel Chapter One, and Virginia Delegate Bob Marshall in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

U.S. Justice Foundation, Citizens United Foundation, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Citizens United and Public Advocate of the United States, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization. Southwest Prophecy Ministries and Daniel Chapter One are religious and educational organizations.

These legal, policy, and religious organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Eberle Communications Group, Inc. is a for-profit corporation, headquartered in McLean, Virginia. Virginia Delegate Bob Marshall (R-13) is a senior member of the Virginia House of Delegates and was the Chief Patron of the Virginia Health Care Freedom

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Act denying enforcement of certain government mandates to obtain or maintain health insurance coverage.[2]

Some of these *amici* filed an *amicus* brief in this Court in the consolidated cases of Burwell v. Hobby Lobby Stores, Inc. and Conestoga Wood Specialities v. Burwell, 573 U.S. ___, 134 S.Ct. 2751 (2014).[3]

SUMMARY OF ARGUMENT

As a critical threshold matter, it is important that this Court not operate on the assumption that Congress wrote into the Affordable Care Act a requirement that contraceptive/abortifacients be provided to women, as some may have believed when this Court decided the Hobby Lobby case in 2014. Indeed, such regulations as now exist were not even written by the Department of Health and Human Services ("HHS"), but rather by a private, secular organization — the Institute of Medicine ("IOM"). Then, ignoring an important dissenting voice on IOM, these recommendations were rubber-stamped and issued by HHS.

The IOM Committee which wrote the report in question was narrowly drawn from one branch of medicine — allopathic medicine. It was devoid of any

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[2] Virginia's Legislative Information Service, 2010 Session, http://lis.virginia.gov/cgi-bin/legp604.exe?101+sum+HB10.

[3] http://www.lawandfreedom.com/site/constitutional/Conestoga%20Wood%20Amicus%20Brief.pdf.

interest in or expertise concerning moral and other issues. The IOM Committee is best viewed as a thoroughly secular entity with a materialistic view of man's body as mere matter in motion. In no way could it be said to reflect, or even have any expertise in, the soul or spirit of man, to say nothing of matters of theology, including, for example, Roman Catholic doctrine and beliefs guiding the lives of the Little Sisters.

The position of the government in this case is that it should have the raw power to compel the Little Sisters to yield its religious principles in service to the pro-sexual license, pro-contraception, pro-abortion, agenda of the Obama Administration. The disdain shown for the Biblically based and Catholic doctrine inspired Petitioners is demonstrated by the willingness of HHS to grant a variety of exemptions to other employers, including those who are political allies of the Obama Administration, while refusing to lift the government's boot off the neck of the Little Sisters.

Almost as if the program were designed to demonstrate the authority of the federal government to coerce Christian organizations to abandon their faith, HHS regulations mandate that "preventative service for women [include] the full-range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."

However, perhaps the apex among a host of acts of governmental arrogance in this case was displayed not

by HHS, but when the U.S. Court of Appeals for the Tenth Circuit acted as if it had ecclesiastical powers of absolution, having decreed that by just signing a paper, Little Sisters would not be "morally complicit in providing contraceptive coverage." *See* Little Sisters Br. at 35. One would expect that on the issue of who the God of Heaven and Earth will hold "morally complicit," it would be the Little Sisters which would have the greater expertise than a federal judge.

The Bible clearly establishes some matters to be within the jurisdiction of the government, and other matters to be within the exclusive jurisdiction of the church. However, although it would be refreshing, it would not be necessary for this Court to rely on Holy Scripture as authority for these principles, as these are the principles on which the First Amendment was based. From Virginia Declaration of Rights (June 1776), to James Madison's Memorial and Remonstrance Against Religious Assessments (June 1785), to Thomas Jefferson's Act for Establishing Religious Freedom (October 1785), to the ratification of the First Amendment together with its Free Exercise Clause (December 1791), there is an unbroken premise that the civil government absolutely has no jurisdiction over the duties that the people owe exclusively to their Creator, no matter how compelling the government's claimed interest may be. Indeed, the Founders did mean it when they mandated "Congress shall make no law ... prohibiting the free exercise [of religion]."

Although one of the petitioners sought review of the First Amendment issue in this case, the Court

limited the grant of certiorari to the issues raised by Religious Freedom Restoration Act. However, as foretold by some when that bill was being considered, and as experience over the last 23 years has demonstrated, RFRA can be read to allow government actions that the First Amendment prohibits. Therefore, to reach a proper decision in this case, these *amici* urge the Court to revise the scope of its grant of certiorari to include the First Amendment issue, and to order re-briefing on this case. Only in this way will the Court's decision resolve all of the issues litigated below, and afford the full protection of the First Amendment to Little Sisters, and the other Petitioners.

ARGUMENT

I. CONGRESS NEVER MANDATED THAT CONTRACEPTIVES, INCLUDING ABORTIFACIENTS, BE PROVIDED TO WOMEN.

In her dissenting opinion in Burwell v. Hobby Lobby, Inc., 134 S.Ct. 2751, 2787-88 (2014), Justice Ginsburg asserted that Congress — acting on the understanding that "'[t]he ability of women to participate equally in the ... life of the Nation has been facilitated by their ability to control their reproductive lives'" — had directed the Department of Health and Human Services to "promulgate[] regulations requiring group health plans to cover all forms of

contraception[4] approved by the Food and Drug Administration (FDA)." In truth, Congress did no such thing. As Little Sisters of the Poor Home for the Aged, Denver, Colorado ("Little Sisters") explained in its Petition for Certiorari in this case:

> Congress itself did **not** define "preventive care" but instead **allowed** HHS to do so. HHS **outsourced** that "important and sensitive decision" to the Institute of Medicine ["IOM"], a **private** organization.... The Institute's

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[4] The meaning of the term "contraception" has undergone radical transformation in recent years. Traditionally, it meant "birth control" which prevented conception, meaning fertilization of an ovum. However, contraception has come to be defined more broadly to include substances or devices used not to prevent fertilization of an egg, but to prevent the implantation of the embryo into the lining of the womb by inducing a miscarriage or an abortion. For those who live according to Catholic doctrine, including the Little Sisters, such "contraceptives" are abortifacients. *See* Brief for Little Sisters, *et al.* at 27. Widely respected Christian author Randy Alcorn's article, "The IUD, Norplant, Depo-Provera, NuvaRing, RU-486 and the Mini-Pill" explains how these abortifacients operate. http://www.epm.org/resources/2013/Feb/22/the-iud-norplant/. *See also* the Alcorn interview video, "Is there a connection between birth control pills and abortion?" http://vimeo.com/16321721. The remarkable story of the campaign undertaken by supporters of abortion to manipulate the medical terminology associated with conception is detailed by Robert G. Marshall & Charles A. Donovan in Blessed are the Barren: The Social Policy of Planned Parenthood (Ignatius Press 1991). One pro-abortion physician explained the purpose of the strategy as follows: "'if a medical consensus develops [that] life, begins at implantation [rather than fertilization], eventually [theologians and jurists] will listen.'" *Id.* at 293.

> definition [became law by] HHS **adopt[ion].** [Little Sisters Petition for a Writ of Certiorari ("Little Sisters Pet.") at 5 (emphasis added).]

Indeed, in its opening brief, the Little Sisters reiterated that "Congress did not specify what 'preventive care and screenings' a plan must cover," having delegated that task to the "Health Resources and Services Administration ('HRSA'), a sub-agency within ... HHS." Brief for Little Sisters, *et al* ("Little Sisters Br.") at 8. And, HHS, "in turn, **asked** the [IOM] ... to develop recommendations to help implement these requirements." *Id.* (emphasis added). Lastly, "HHS adopted the IOM's recommendation **entirely**." *Id.* (emphasis added).

Therefore, it was not Congress — and not even HHS or HRSA — but a nongovernment entity that specified the "minimum essential coverage ... for 'preventive care and screenings' for women without 'any cost sharing requirements.'" *Id.* at 7-8. In effect, Congress wrote a check drawn on its bank of legislative powers — payable to the executive department — which was then endorsed over to IOM, transferring its legislative power to define "preventive care" to a nongovernment policy advocacy organization. In so doing, the Obama Administration wholly disregarded the unanimous opinion of the Supreme Court that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). And when that delegation positions private interests to set the rules for their own benefit

and for the benefit of affiliated entities and persons, the Court condemned such delegation to be "unknown to our law and ... utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* at 537.

Nonchalantly, dissenting Justice Ginsburg heralded this transfer of power to IOM. *See* Hobby Lobby at 2788-89. Indeed, she lauded IOM for having "convened a group of **independent** experts [who] determined that preventive coverage should include the 'full range' of FDA-approved contraceptive methods." *Id.* at 2788-89 (emphasis added). According to Justice Ginsburg, "the IOM[] report [did no more than] express[] concerns similar to those voiced by congressional proponents of the Women's Health Amendment," but as Justice Alito's majority opinion observed, "Congress ... did not specify what types of preventive care must be covered." *Id.* at 2762. Instead, the Hobby Lobby majority asserted that Congress had delegated "that **important and sensitive** decision [to] HRSA which, in turn, consulted [IOM], a nonprofit group of volunteer advisors in determining which preventive services to require." *Id.* at 2762 (emphasis added). Although the Hobby Lobby majority characterized IOM's determinations as "recommendations" (*id.*), and Justice Ginsburg called them "suggestions" (*id.* at 2789), the fact remains that, as the Little Sisters brief asserts, the IOM recommendations were adopted in their entirety. Little Sister's Br. at 8. And, as the Little Sister's Petition initially put it, the legislative and executive departments "outsourced th[e] 'important and

sensitive decision' to the [IOM], a private organization." Little Sisters Pet. at 5.

At issue in this case, then, is whether Little Sisters should be legally obliged to obey a federal mandate that it facilitate a preventive care program for its female employees in conformity with the views of a private, nongovernment entity. The absurdity of such a mandate is fully revealed by contrasting the composition and purpose of IOM with that of the Little Sisters, and then assessing the impact that such forced complicity would have upon the Little Sisters' exercise of religion.

II. IOM IS TOTALLY SECULAR, WHILE LITTLE SISTERS IS DEVOUTLY CATHOLIC.

IOM, now the National Academy of Medicine, presents itself as "an independent organization of eminent professionals from diverse fields including health and medicine; the natural, social, and behavioral sciences; and beyond."[5] A self-described elite organization, prior to changing its name, IOM — then the health arm of the National Academy of Sciences — asserted that it was "renowned for its research program,"and for its prestigious roster of members from "not only the health care professions but also the natural, social, and behavioral sciences, as well as law, administration, engineering, and the humanities." Operating through committees purportedly carefully composed to ensure the requisite

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[5] http://nam.edu/about-the-nam/.

expertise and to avoid conflicts of interest, the IOM previously claimed that it "applie[d] the National Academies ... rigorous research process, aimed at providing objective and straightforward answers to difficult questions of national importance."[6]

In 2011, the IOM Committee on Preventative Services for Women ("IOM Comm.") was composed of 16 health care academics drawn exclusively from the conventional pharmaceutical-centered allopathic school of medicine. *See* IOM Comm. Report, Appendix C at 223-30. Excluded from its membership were practitioners of alternative schools of medicine, such as chiropractic, homeopathy, naturopathy, acupuncture, American Indian, holistic therapies, midwifery, Chinese or Eastern medicine, herbal medicine, and others. Additionally, although the IOM Committee acknowledged that there were "ethical, legal and social issues" relevant to coverage decisions (*id.* at 7), it did not include any experts with experience in those areas. The IOM Committee limited itself to so-called "evidence-based" studies[7] to

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[6] http://iom.nationalacademies.org/About-IOM/Study-Process.aspx; *see also* http://nationalacademies.org/studyprocess/index.html.

[7] Reliance on evidence-based studies led the FDA to advise Americans for decades that fat was bad and sugar was good. However, just days ago, the U.S. Department of Agriculture and the Department of Health and Human Services, relying on FDA research, no doubt including evidence-based studies, have now announced that fat is good and sugar is bad. E. Brodwin and K. Taylor, "The government just proposed a sea change to American diets," Business Insider.com, Jan. 7. 2016.

determine the services necessary for the health and well-being of women, notwithstanding their acknowledgment that "[h]ealth outcomes occur because of multiple factors including biology, behavior, and the social, cultural, and environmental contexts in which women live." *Id.* at 18.[8]

Conspicuously absent from IOM's work was any consideration or understanding of what constitutes the "health and well-being" of women from a perspective of religious faith — Christian, Jewish, Muslim, or otherwise. This omission was not based upon any finding that such faith or any lack thereof was irrelevant to women's health and well-being, but apparently because the spiritual dimension of life is not "evidence-based." As a direct result of this exclusion, the IOM omitted entirely any moral, religious, or spiritual considerations in formulating its contraceptive mandate. Instead, the committee was exclusively preoccupied with an atheistic, materialistic view of mankind — as if men and women were mere matter in motion — giving no thought whatsoever regarding the effect that the contraceptive services it was promoting, including the effects of abortifacients which kill babies in the womb, would have on the

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http://www.businessinsider.com/fda-sugar-limits-send-big-soda-reeling.

[8] The limitations of so-called evidence-based "science" should have been put to rest once and for all when the illegitimacy of the "science" of eugenics was finally recognized. Sadly, that recognition came long after this Court embraced that "science" in Buck v. Bell, 274 U.S. 200 (1927) — a case which has never been reversed.

human soul and spirit of the woman, to say nothing of the baby. *See* IOM Comm. Report at 102-10.

In contrast, the Little Sisters sincerely and steadfastly "oppose, based on Catholic doctrine, sterilization, contraception, and abortion, and they believe that it is religiously wrong for them to facilitate the provision of contraceptive procedures and devices." Little Sisters Br. at 29. Dedicated to the "build[ing of] a Culture of Life," the Little Sisters are dedicated to "serving the sick and elderly poor." *Id.* Under a vow of "obedience to God and of hospitality 'to care for the aged as if they were Christ himself,' [they] treat each 'individual with the dignity they are due as a person loved and created by God.'" *See* Little Sisters Pet. at 10. Such noble and honorable principles defy evaluation by secular scientists.

III. THE GOVERNMENT WOULD REQUIRE LITTLE SISTERS TO ADJUST ITS CATHOLIC FAITH TO ACCOMMODATE IOM'S RADICAL FEMINIST VIEWS IN VIOLATION OF RFRA.

The government would have Little Sisters adjust its stated religious doctrine and ministry in order to accommodate IOM's secular goals which, as it turns out, are not, in the government's eyes, to ensure that Little Sisters' female employees would be able to obtain preventive care insurance. Rather, the government seeks to forward IOM's overarching objective of promoting and facilitating a secularized sexual lifestyle for women without the need to incur any out-of-pocket costs to prevent or terminate an

unwanted pregnancy or sexually transmitted disease. After all, as the government has conceded, even if the Little Sisters complied with the HHS mandate to facilitate Obamacare-approved preventive care for its employees, this would in no way mean that Little Sisters' female employees could, thereby, obtain through Little Sisters' health care program such preventive care insurance. Little Sisters Br. at 30, 68-70. Not only would compliance with the HHS mandate fail to achieve that meager health insurance objective, but also a variety of exemptions already granted to, and enjoyed by, other employers, including churches and integrated ministries, means that the preventive care mandate does not aid tens of millions of employees of such exempt entities. *See id.* at 61-68. Little Sisters asks why HHS would not do the "same for petitioners." *Id.* at 71. As the Little Sisters brief contends:

> That the government's "proffered objectives are not pursued with respect to analogous non-religious conduct" ... not only "raises serious doubts about whether the government [was] in fact pursuing the interest[s] it invokes" when it refused to grant petitioners an exemption, ... but also defeats any argument that the interests it asserts are compelling. [Little Sisters Br. at 71.]

Although one could speculate that the exemptions were granted entirely for "political reasons" to minimize opposition and reward supporters, the more plausible explanation is that the HHS-mandated preventive care package is actually a means calculated

to reach an entirely different objective. To begin to answer this question, one must return to the author of the "preventive care" mandate, the committee of 16 recruited by IOM, to define what Congress had left undefined — "preventive care and screenings" for women.

Composed entirely of health care professionals, the IOM Committee issued its report with only one dissenting opinion.[9] Purporting to apply "evidence-based guidelines" and "evidence reviews," the IOM Committee found that women's "well-being" would best be served by preventive measures that effectively reduced the "targeted ... condition" of "unintended pregnancy":

> The evidence provided to support a recommendation related to unintended pregnancy is based on systematic evidence reviews and other peer-reviewed studies, which indicate that contraception and **contraceptive counseling** are effective at reducing unintended pregnancies. [*See id.* at 10 (Table S-1) (emphasis added).]

As noted above, on these grounds, the IOM Committee recommended, and HHS adopted, the contraceptive services mandate that "preventive service for women [include] the full range of Food and Drug Administration-approved contraceptive **methods**, sterilization **procedures**, and patient

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[9] *See* IOM Comm. Report, Appendix D ("App. D") at 231-35.

education and counseling for women with reproductive capacity." *Id.* (emphasis added).

While the IOM Committee's findings and conclusions purport to be "evidence-based," the studies relied upon in its report do not even come close to demonstrating that making contraceptives more readily available to more women would result in fewer unintended pregnancies or promote healthy birth spacing. *See* IOM Comm. Report at 102-10. Dissenting IOM Committee member, Professor Anthony Lo Sasso,[10] has attributed this gap primarily to "the lack of time [which] prevented a serious and systematic review of evidence for preventive services," and to the dogged "zeal" exhibited by the committee "to recommend something despite the time constraints and a far from perfect methodology." IOM Comm. Report, App. D at 232. Thus, Professor Lo Sasso concluded that the entire Report issued by the Committee was "fatal[ly] flaw[ed]" (*id.* at 233) because:

> the committee process for evaluation of the evidence **lacked transparency** and was largely subject to the **preferences** of the committee's composition. Troublingly, the process tended to result in a mix of objective and **subjective determinations** filtered through a lens of **advocacy**. [*Id.* at 232 (emphasis added).]

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[10] Professor Lo Sasso is Senior Research Scientist, Division of Health Policy and Administration, University of Illinois at Chicago School of Public Health.

Indeed, the IOM Committee Report promotes a one-dimensional view of the educational and counseling components of family planning services, and without any moral constraint on sexual activity, focuses exclusively on maximizing the "availability of contraceptive options." *Id.* at 107. Underlying this goal is the unproved assumption that the contraceptive mandate is necessary not only for women's health, but also for her "well-being." *See id.* at 1, 2, 3, 4, 6, 8, 13, 16, 17, 20, 21, 22, and 23. Remarkably, the IOM Committee made no effort to distinguish between true contraceptives that only prevent conception and those so-called contraceptives that operate by preventing the implantation of an embryo leading to death. *See id.* at 109-10. Instead, completely absorbed in its goal to reduce "unwanted or mistimed" pregnancies, the IOM Committee recommended any FDA-approved means, even abortion-inducing drugs, to facilitate the lifestyle of "sexually active" women by reducing the risk not just of pregnancy, but also of full-term pregnancies, to zero. *See id.* at 102-04.

Stripped of its "evidence-based" facade, the IOM Committee Report encourages amoral recreational sex without reproductive consequences to be the optimal "quality of life"[11] and "life-course orient[ation]"[12] for all American women. This life view is diametrically and transparently opposed to the Catholic Culture of Life which the Little Sisters are dedicated to build, and upon which they stand in their opposition not only to

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[11] *Id.* at 6.

[12] *Id.* at 12.

contraception, abortion, and sterilization, but to any action by them that would "facilitate the provision of contraceptive procedures and devices." Little Sisters Br. at 29.

Rather than accommodating the Little Sisters' commitment to Biblical morality,[13] the Obama Administration has chosen to adopt the IOM Committee's commitment to secular amorality. The Administration coerces the Little Sisters to do the necessary paperwork to enable others to secure the requisite preventive care coverage, as if by signing off, the Little Sisters would, like Pontius Pilate, have washed their hands of the entire affair. *See* Little Sisters Br. at 50. Indeed, the United States Court of Appeals for the Tenth Circuit acted as if it had ecclesiastical powers of absolution, having decreed that by just signing a paper, Little Sisters would not be "morally complicit in providing contraceptive coverage." *See* Little Sisters Br. at 35. As Little Sisters point out in its brief, it is completely outside the jurisdiction of civil courts to resolve theological questions. *Id.* at 48-49.

Not only is the interest of the government in theological matters not compelling, but also it is illegitimate. Indeed, not only has Congress by its delegation of power to HHS, HRSA, and IOM "burdened" the Little Sisters' "free exercise of religion," but also it has done so by illegitimate means and for

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[13] *See, e.g.*, Proverbs 6:27-29; Hebrews 13:4; and I Corinthians 6:18.

an illegitimate purpose, all in violation of its own Religious Freedom Restoration Act.

IV. SUBJUGATING LITTLE SISTERS TO IOM'S SECULAR VIEWS VIOLATES THE FIRST AMENDMENT.

A. Religion: A Duty Owed Exclusively to God

The action taken by the Tenth Circuit to overrule the Little Sisters' collective religious conscience grossly violates the First Amendment Establishment and Free Exercise guarantees. Those guarantees, as ably stated by James Madison in his famous Memorial and Remonstrance Against Religious Assessments, secure those duties owed exclusively to the Creator, and are enforceable only by "reason and conviction," not by "force or violence":

> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [citation omitted]. The **Religion** then of every man must be left to the conviction and **conscience** of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an **unalienable right**. It is unalienable, because the **opinions** of men, depending only on the evidence contemplated by their own minds **cannot follow the dictates of other men.** [J. Madison, "Memorial and

> Remonstrance" to the Honorable the General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in 5 The Founders' Constitution, p. 82 (item # 43) (P. Kurland & R. Lerner, eds., U. of Chi.: 1987) (emphasis added).]

Four months later, the Virginia General Assembly enacted into law Thomas Jefferson's "Act for Establishing Religious Freedom," the preamble of which affirmed this same jurisdictional principle.[14] The Act's preamble read:

> Whereas Almighty **God hath created the mind free**; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious **presumption of legislators and rulers**, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, **setting up their own opinions** and modes of thinking as the only true and infallible, and as such endeavouring **to impose them on others**, hath established and maintained false

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[14] *See* Reynolds v. United States, 98 U.S. 145, 163 (1879).

> religions over the greatest part of the world, and through all time.... [Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 The Founders' Constitution at 84 (item # 44) (emphasis added).]

B. Free Exercise of Religion: Matters of Opinion.

Thus, the 1776 Virginia Declaration of Rights not only defined "religion," but also secured its "free exercise," that is, its exercise free from any and all claims of civil jurisdiction. And the choice could not have been more deliberate. As originally drafted by George Mason, Section 16 of that Virginia Declaration read, as follows:

> That as Religion, or the Duty which we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be governed only by Reason and Conviction, not by Force or Violence; and therefore that all Men should enjoy the fullest **Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless, under colour of Religion, any Man disturb the Peace, the Happiness, or Safety** of Society, or of Individuals.... [George Mason & Historic Humans Rights Documents,

> First Draft, May 20-26, 1776) (emphasis added).[15]]

At the state constitutional convention, James Madison objected to the provision "'that all men should enjoy the fullest toleration in the exercise of religion'"[16]:

> Madison wanted to move beyond the tradition of religious toleration introduced by John Locke and the English Toleration Act of 1689.... So the twenty-five-year-old delegate from Orange County to Virginia's constitutional convention put forward these words: "All men are equally entitled to the free exercise of religion." [Constitutional Debates on Freedom of Religion at 31.]

"Madison's proposal that a right to 'free exercise of religion' should replace the phrase on religious toleration was approved." *Id.* Thus, Section 16 as adopted by the convention read, in pertinent part, "and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience," excising any and all reference to any and all exceptions for the peace, happiness or safety of the larger society as determined by any civil magistrate.

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[15] http://www.gunstonhall.org/georgemason/human_rights/vdr_first_draft.html.

[16] *See* Constitutional Debates on Freedom of Religion, p. 31 (J. Patrick & G. Long, eds., Greenwood Press: 1999).

Nine years later, in his 1785 *Memorial and Remonstrance,* Madison painstakingly explained the absolute principle upon which the free exercise of religion rests. The right "is unalienable ... because what is here a right towards men, is a duty towards the Creator"[17]:

> It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is **wholly exempt** from its cognizance. [*Id.* (emphasis added.)]

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[17] "Memorial and Remonstrance," The Founders' Constitution at 82.

C. Free Exercise Restricted, and Now Revived.

For 170 years after the ratification of the Bill of Rights, Madison's jurisdictional principle went unchallenged.[18] In 1963, however, the Supreme Court departed from that tradition, treating the free exercise guarantee as if it were a mere rule of religious toleration, and condemning the jurisdictional principle to apply only to those cases involving "religious belief." As for laws impacting on "religious practices," the Court created a judicial balancing test in deciding whether the law was compelling enough to override a person's religious exercise.[19] That atextual experiment came to an end in 1990 when the Court acknowledged again that the jurisdictional principle undergirded a free exercise guarantee that included not only belief, but practices outside the authority of the civil government:

> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from ... certain

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[18] *See* H. Titus, "The Free Exercise Clause: Past, Present and Future," 6 REGENT L. REV. 7, 10-15 (1995).

[19] *Id.* at 15-22.

> modes of transportation. [Employment Division v. Smith, 494 U.S. 872, 877 (1990).[20]]

Having rejected tolerance as the governing principle of the free exercise guarantee, the Smith Court rejected the belief/practice dichotomy, returning the Court to the text's jurisdictional principle. Although the state had no jurisdiction to regulate "religion," the Smith Court ruled that the free exercise guarantee did not "excuse ... compliance" with an "otherwise valid law prohibiting conduct that the State is **free** to regulate." Smith, 494 U.S. at 878-79 (emphasis added).

Whether the state is "free" to regulate particular conduct is, then, determined by the original definition of "religion" in the free exercise guarantee itself. This is the teaching of the original First Amendment text as illumined by the express definition of religion of its Virginia forerunner. And this, in turn, is the lesson of this Court in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. ____, 132 S.Ct. 694 (2012). In Hosanna-Tabor, this Court rejected the EEOC's argument that the American Disabilities Act's prohibition of employer retaliation against employees filing a grievance under the Act was immune from a free exercise challenge because it was a "neutral law of general applicability." *See id.*, 132 S.Ct. at 706-07. The Court found that the internal governance of a church body, including the hiring and firing of ministers, is outside the jurisdiction of the federal government. While the Court did not explicitly pose

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[20] *See also* Titus, "The Free Exercise Clause" at 22-23.

the issue as to whether such employment relations involve duties owed to the Creator, enforceable only "by reason and conviction, not by force or violence," the Court relied upon ecclesiastical history to establish that the free exercise guarantee grew out of a jurisdictional conflict between parishioners and the English monarchy over church self-government. *Id.*, 132 S.Ct. at 702-03. "[T]he Religion Clauses," Chief Justice Roberts wrote, "ensured that the new Federal Government — unlike the English Crown — would have no role in filling ecclesiastical offices," citing in support none other than James Madison who the Chief Justice reminded us was "'the leading architect of the religion clauses of the First Amendment.'" *Id.* at 703.

As chief architect of the First Amendment, it was Madison, along with Jefferson, who understood that it erected a jurisdictional barrier between matters that belonged to church government and matters that belonged to civil government of the state.[21] The state has absolutely no jurisdiction over duties owed to the Creator which, by nature, are enforceable only "by reason and conviction."

D. The Contraceptive Services Mandate Violates Freedom of Opinion.

Although Jefferson's Bill to Establish Religious Freedom, as enacted by the Virginia Assembly, reduced Jefferson's predicate statement to the single phrase — "that Almighty God hath created the mind

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[21] *See also* Matthew 22:20-21.

free" — the change did not signal any narrowing of the scope of the Act. To the contrary, both the preamble to the initial Bill and the one in the Act adopted by the Assembly laid the groundwork for the first principle of the free exercise of religion: "[T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *See* 5 The Founders' Constitution at 77, 84. And this first principle[22] of the free exercise of religion is first among those violated by the ACA contraceptive mandate.

As revealed in Section I, *supra*, the contraceptive mandate is the product of the 16-member IOM Committee, operating under a charge from the Office of the Assistant Secretary for Planning and Evaluation ("ASPE") of HHS. IOM Comm. Report at 1. In pertinent part, the charge reads:

> The [IOM] will convene an expert committee to review what preventive services are necessary for women's **health and well-being** and should be considered in the development of comprehensive guidelines for preventive services for women.... ASPE **will use the information and recommendations** from

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[22] The principle is akin to the "speaker autonomy" rule derived by this Court from the First Amendment. *See* Hurley v. Irish-American Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573, 575 (1995) ("[T]his use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right to choose "not to propound a particular point of view.")

> the committee's report to guide policy and program development related to provisions in the [ACA] addressing preventive services for women. [*Id.* at 2 (emphasis added).]

Among the information and recommendations of the IOM Committee is the contraceptive services mandate, the specific goal of which is "a reduction in unintended pregnancies." IOM Comm. Report at 10. Included in the means to reach this goal are "patient education and counseling for women with reproductive capacity." *Id.* In a more detailed exposition of its recommendation, the IOM Committee Report states that education and counseling "are provided to prevent unintended pregnancies, which is defined "as a pregnancy that is either unwanted or mistimed at the time of conception" (*id.* at 102), the ultimate goal being "that 'all pregnancies should be intended.'" *Id.* at 104.

Unsurprisingly, the IOM Committee's recommended one-dimensional education and counseling services are geared to encourage and guide women with reproductive capacity to use contraceptives (including abortifacients) to prevent and to end pregnancies. IOM Comm. Report at 107

> Education and counseling are important components of family planning services because they provide information about the availability of contraceptive options, elucidate method-specific risks and benefits for the individual woman, and provide instruction in effective use of the chosen method. [*Id.*]

Based on "[s]ystematic evidence reviews and other peer-reviewed studies [that] provide evidence that contraception and contraceptive counseling are effective at reducing unintended pregnancies," the IOM Committee Report strongly recommended that both be added to the "array of preventive services available to women under the ACA." *Id.* at 109.

The IOM Committee's message is unmistakable: Female sexual activity without risk of conception to a full-term pregnancy is to be encouraged by the contraceptive mandate, not only by making a wide range of contraceptives/abortifacients available, but by an education and counseling program designed to ensure that more and more women do not get pregnant unless "at the point of conception" they want to. This mandate is grounded in the "opinion" of the IOM's 16-member committee that a woman's "health and well-being" are adversely affected by the risk of an unwanted pregnancy. To reduce risks of unplanned pregnancies, the IOM Committee recommended, and HHS adopted, an educational and counseling program encouraging and promoting the use of a wide range of contraceptives, including FDA-approved abortifacients. *See id.* at 109-10.

By adopting IOM Committee opinions on such contraceptive use as necessary to achieve women's health and well-being, HHS would compel the Little Sisters to facilitate ACA's contraceptive services mandate, to provide their employees education and counseling that propagate opinions on women's "health and well-being" contrary to the Catholic doctrine that they espouse and live by. This coercive plan is backed

up by stiff monetary fines for noncompliance. *See* Little Sisters Br. at 21, 27-33.

For HHS to compel Little Sisters to facilitate the implementation of its mandate, the IOM Committee's opinion as to the health and well-being of their female employees should be recognized by any fair observer to be "both sinful and tyrannical." It is sinful because HHS is violating the Little Sisters' vow of obedience to God. It is tyrannical because HHS is employing force and violence to require the Little Sisters to support and promote an opinion on human reproduction and life held by an IOM Committee of men and women who do not share the Little Sisters' Catholic faith.

The HHS mandate would also destroy the free marketplace of ideas established by the free exercise guarantee, by requiring the Little Sisters to aid and abet the IOM Committee's proselytizing efforts in support of a female reproductive health policy that would sacrifice innocent life in furtherance of a lifestyle that exalts sexual license without risk of unintended pregnancy. As such, the contraceptive mandate violates the free exercise of religion which prohibits the government from using its power to force any person to engage in any form of "proselytizing" which, according to Smith, is conduct that the state is not free to regulate. *See* Smith, 494 U.S. at 878-79.

V THE COURT SHOULD ORDER RE-BRIEFING ON WHETHER THE CONTRACEPTION/ABORTIFACIENT MANDATE OF THE AFFORDABLE CARE ACT VIOLATES THE FREE EXERCISE CLAUSE.

In this case, certiorari was granted for review of seven petitions, emanating out of four cases decided in 2014 and 2015 by four different U.S. Courts of Appeals (Third, Fifth, Tenth, and District of Columbia). Each petition for certiorari presented different questions for review.[23] Except for one question contained in one petition, review was sought only of the statutory issue whether the RFRA was violated by the Affordable Care Act's contraception/abortifacient mandate.[24] The lone exception was the Little Sisters Petition, which presented as its third question:

> Does the **First Amendment** allow HHS to discriminate among nonprofit religious employers who share the same sincere religious objections to the contraceptive mandate by exempting some religious employers while insisting that others comply? [Little Sisters Pet. for Cert. at ii (emphasis added).]

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[23] *See* Appendix Section I for the questions presented by the various petitioners.

[24] Although the issue presented by Southern Nazarene University asserted a "free exercise violation," that claim related to RFRA. Southern Nazarene University Petition for Certiorari, p. i.

Indeed, in the Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015), the Tenth Circuit conducted a complete Free Exercise clause analysis, ultimately finding no violation because "the Mandate is both neutral and generally applicable and supported by a rational basis...." 794 F.3d at 1199. Additionally, one other Court of Appeals below addressed the Free Exercise Clause issue — Priests for Life v. Department of Health and Human Services, 772 F.3d 229 (D.C. Cir. 2014), ultimately concluding that "[b]ecause the contraceptive coverage requirement is a neutral law of general applicability, Plaintiffs' free exercise claim fails." 772 F.3d at 269. However, when certiorari was granted, the Court expressly declined to review the constitutional issue raised by Little Sisters of the Poor or any other constitutional issue.[25] Accordingly, the questions presented in the opening brief filed jointly by the Little Sisters and Priests for Life, *et al.*, revised the questions presented somewhat to eliminate any constitutional reference and limit the scope of the case to RFRA.[26] Neither petitioners' brief presented any First Amendment-based arguments.

This Court's refusal to consider the First Amendment constitutional issue takes the process of constitutional exclusion one step beyond that which occurred last year in the case of Burwell v. Hobby Lobby Stores, Inc. There, one of the two cases consolidated only for purposes of oral argument, Hobby

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[25] http://www.supremecourt.gov/qp/15-00105qp.pdf.

[26] *See* Appendix Section II for the questions on which certiorari was granted.

Lobby, presented only a RFRA question for review. But the case consolidated with it, Conestoga Wood Specialties, argued on both RFRA and the First Amendment Free Exercise Clause. The Court granted certiorari on all issues.[27]

These *amici* filed an *amicus curiae* brief[28] on the Free Exercise Clause issue raised by Conestoga Wood Specialties, eschewing participation in the Hobby Lobby case, because it believed that the jurisdictional barrier of the Free Exercise Clause provided the businesses principled and categorical protection against government coercion. Perhaps because it found in favor of the businesses based on RFRA, the majority of this Court avoided completely the Free Exercise Clause issue. However, the problem of this approach was that the victory for the businesses may prove to be a hollow one — as this Court's decision was based on a finding that the Obamacare contraception/abortifacient mandate was not "the least restrictive means of serving a compelling government interest." Hobby Lobby at 2759. The Court ruled that the government had to accommodate the religious beliefs of Conestoga and Hobby Lobby, because "the Government [could] assume the cost of providing the four contraceptives at issue," thereby providing certain

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[27] http://www.supremecourt.gov/qp/13-00356qp.pdf.

[28] *Amicus* brief of Eberle Communications Group, Inc., *et al.*, Conestoga Wood Specialties Corp. v. Sebelius (Jan. 28, 2014). http://lawandfreedom.com/wordpress/obamacare-contraceptionabortion-services-mandate-conestoga-wood-specialties-corp-v-sebelius-u-s-supreme-court-amicus-brief/.

access to abortifacients, the cost of which would be paid by the taxpayer instead of those employers who have a religious objection to abortion. *Id.* at 2780. As Justice Kennedy stated in his concurrence: "It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees," including access to abortion. *Id.* at 2786. In other words, the decision rendered by this Court could not have been more narrow in its protection of the free exercise of religion, and did nothing whatsoever to protect the sanctity of human life.[29]

The Hobby Lobby dissent took time away from its commentary on RFRA to assert that "Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga might assert is foreclosed by this Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U.S. 872 (1990)." Hobby Lobby at 2790 (Ginsburg, J., dissenting). Indeed, Justice Ginsburg's view appears to be the prevailing view of most of the petitioners in this case. As Judge Marjorie Rendell[30] stated, in writing for the

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[29] In Priests for Life, the D.C. Circuit accurately reported that "[t]he Supreme Court in *Hobby Lobby* assumed, without deciding, that the governmental interest in 'guaranteeing cost-free access' to contraception was 'compelling. [citation omitted]." 772 F.3d at 257.

[30] Senior Judge Rendell is no stranger to the politics of abortion, as the (reportedly separated) wife of former Democratic Pennsylvania Governor Ed Rendell, who was considered as a running mate for Senator John Kerry in his 2004 presidential

Third Circuit in Geneva College v. Secretary, HHS, 778 F.3d 422 (3d Cir. 2015):

> Congress enacted RFRA in 1993 in response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*. In *Smith*, the Supreme Court rejected the balancing test for evaluating claims under the Free Exercise Clause of the First Amendment set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* under which the Court asked whether the challenged law substantially burdened a religious practice and, if it did, whether that burden was justified by a compelling governmental interest.... Congress then passed RFRA to legislatively overrule the *Smith* standard for analyzing claims under the Free Exercise Clause.... [*Id.* at 430-31 (citations omitted).]

Indeed, in the early 1900's, RFRA had the support of many Christian and other organizations, believing that those who placed high value on the Free Exercise Clause had put one over on President Bill Clinton, who signed the bill into law near the end of his first year in office, on November 16, 1993. Others, however, saw the problems inherent in RFRA from the outset, and thought that it was President Clinton and those supporting RFRA in Congress who better understood how RFRA could be abused by a largely secular federal

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campaign and who continues to be a prominent Democratic politician.

judiciary which had repeatedly demonstrated itself at odds with the American people on matters involving religious liberties.[31] Congress was exposed to these concerns, *inter alia*, through testimony.[32] Those concerns need to be revisited.

First, the protection of religious liberty promised by RFRA proponents was dramatically overstated. It was naively assumed by many that the "compelling interest" test would provide a wide berth for a variety of religious claims. In fact, however, after two initial victories — one involving unemployment benefits and the other education of children — the Supreme Court deferred to claimed government interests in every free exercise case, giving "short shrift to the religious claim and the significant burden imposed on the dissenting

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[31] *See e.g.*, McCollum v. Board of Education, 333 U.S. 201 (1948) (public school released time); Engel v. Vitale, 370 U.S. 421 (1962) (public school prayer); Abington School District v. Schempp, 374 U.S. 203 (1963) (public school Bible reading); Stone v. Graham, 449 U.S. 39 (1980) (posting of the Ten Commandments in public schools); Edwards v. Aguillard, 482 U.S. 578 (1987) (teaching of creation in public schools). *But see* Town of Greece v. Galloway, 572 U.S. ___, 134 S.Ct. 1811 (2014) (opening legislative sessions with prayer) where the Court may have returned to historic principles.

[32] *See, e.g.*, testimony of Professor Robert A. Destro, Catholic University of America, and of Herbert W. Titus, then Dean, Regent University School of Law, Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, on H.R. 2797, Religious Freedom Restoration Act of 1991 (May 13-24, 1992). http://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf.

religious adherent." Titus, "The Free Exercise Clause," at 7, 19-22.

Second, the legal premise of RFRA was incorrect. Based on the use of three balancing tests, RFRA provides:

> (a) In general
> Government shall not **substantially** burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception
> **Government may substantially burden a person's exercise of religion** only if it demonstrates that application of the burden to the person-
>
> (1) is in furtherance of a **compelling governmental interest**; and
> (2) is the **least restrictive means** of furthering that compelling governmental interest. [42 U.S. Code § 2000bb-1(a) and (b) (emphasis added).]

Thus, RFRA actually makes it the law of the United States that, under certain circumstances, as in the seemingly unreviewable opinion of a majority of the nine unelected lawyers then sitting on this Court, the government "may substantially burden a person's exercise of religion..." when the government's claimed interest really mattered. *See* United States v. Lee, 455 U.S. 252 (1982). Such a notion would have been

unthinkable to Madison, or Jefferson, for the reasons discussed in Section IV, *supra*.

RFRA also shifts the focus of the debate. As noted author M. Stanton Evans observed: "He who writes the resolved clause wins the debate." If the issue is the First Amendment, the question is (or at least should be) whether the law in question "prohibit[s] the free exercise [of religion]" based on the fixed authorial intent[33] of the Founders. However, if the issue is RFRA, the question is whether there is a substantial burden, and if so, whether there is a compelling government interest, and whether it is the least restrictive means of achieving that interest based on the personal views of modern judges. Each RFRA subsection presupposes judicial use of a balancing test of the sort that Justice Scalia described in a different context to be a "judge-empowering 'interest-balancing inquiry.'" District of Columbia v. Heller, 554 U.S. 570, 634 (2008). Such tests focus attention away from the jurisdictional limits imposed on the federal government by the First Amendment, to the policy preferences of modern federal judges.[34] It should not

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[33] *See* E.D. Hirsch, Jr., Validity in Interpretation at viii, 1, 5, 212-13 (YALE UNIV. PRESS 1967).

[34] For example, by requiring the case to be litigated on RFRA grounds, the Supreme Court deprived the Petitioners of even arguing that the contraceptive/abortifacient mandate operates to interfere with the terms of the relationship between a religious organization and its employees — which is protected under the First Amendment. *See* Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, *et al.*, 565 U.S. ____, 132 S.Ct. 694 (2012), where this

be considered strange that these *amici* would prefer that the issue be decided based on the views of the Founders who fashioned the First Amendment, rather than modern federal judges who have demonstrated that they hold other values which they are rolling out in the guise of discovering new meanings of an evolving Constitution. *See, e.g.*, Obergefell v. Hodges, 576 U.S. ___, 135 S.Ct. 2584 (2015).

Moreover, if the proof is in the pudding, it can now be seen that RFRA provided none of the Petitioners any protection whatsoever from a law prohibiting the free exercise of Petitioners' anti-abortion religious beliefs in any of the four Court of Appeals decisions below. Three of the Court of Appeals decisions found no substantial burden on free exercise. Only in the Priests for Life case did any of the courts of appeal even reach the secondary issue of "compelling government interest," and there, the D.C. Circuit found that there was one. Indeed, RFRA has proven to be a weak reed on which to predicate the religious liberties of the American people.

Thus, it can be seen that this Court, by excluding any briefing of the Free Exercise issue in this case, has tilted the playing field — making it virtually impossible for the Petitioners to achieve a meaningful victory. The only type of victory that may be possible

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Court unanimously ruled that federal discrimination laws may not constitutionally constrain the employment relationship between religious organizations and ministry employees, no matter how strong the government's interest may be to protecting disabled persons from employment discrimination.

would be analogous to the type of Pyrrhic victory achieved in Hobby Lobby, where the taxpayers were saddled with the obligation to pay for the abortions of those Hobby Lobby employees who want them.

CONCLUSION

For the reasons set out above, this Court should revise the questions presented on which certiorari is granted, and ask the parties to participate in supplemental briefing on the Free Exercise Clause issue. Unless this Court pushes this "reset button," it could easily reach a decision that RFRA provides no statutory protection for Petitioners, forcing them to be morally complicit in facilitating abortion, even though a decision reached under the Free Exercise Clause would have demanded the opposite result. If such a result were reached as a result of this Court's tactical exclusion of the constitutional defenses available to Petitioners, its decision would not resolve the central First Amendment jurisdictional issue and therefore would deserve no respect from the American people.

Respectfully submitted,

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APPENDIX

APPENDIX:
QUESTIONS PRESENTED BY THE PARTIES AND ON WHICH CERTIORARI WAS GRANTED

I. QUESTIONS PRESENTED BY THE PARTIES.

Third Circuit

Zubik v. Burwell, 778 F.3d 422 (3rd Cir. 2015) presented two questions:

> 1. Whether the HHS Mandate and its "accommodation" violate the Religious Freedom Restoration Act ("RFRA") by forcing religious nonprofits to act in violation of their sincerely held religious beliefs, when the Government has not proven that this compulsion is the least restrictive means of advancing any compelling interest.
>
> 2. Whether RFRA allows the Government to divide the Catholic Church by creating a narrow "religious employer" exemption that applies to "houses of worship" but excludes the Church's separately incorporated nonprofit entities that implement core Catholic teaching by providing charitable and educational services to their communities.

[http://www.supremecourt.gov/qp/14-01418qp.pdf.]

NOTE: Grant of certiorari was limited to question 1.

Geneva College v. Burwell, 778 F.3d 442 (3rd Cir. 2015) presented one question:

Whether, under *Hobby Lobby*, the Mandate's imposition of seamless abortifacient coverage on objecting religious nonprofit organizations' health plans substantially burdens religious exercise and violates RFRA.

[http://www.supremecourt.gov/qp/15-00191qp.pdf]

Fifth Circuit

East Texas Baptist University v. Burwell, 793 F.3d 449 (5th Cir. 2015) presented one question:

Does the availability of a regulatory option for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized *in Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

[http://www.supremecourt.gov/qp/15-00035qp.pdf]

Tenth Circuit

Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015) presented three questions:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in

circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective - namely, the provision of no-cost contraceptives to the objector's employees?

3. Does the **First Amendment** allow HHS to discriminate among nonprofit religious employers who share the same sincere religious objections to the contraceptive mandate by exempting some religious employers while insisting that others comply? [Emphasis added.]

NOTE: Grant of certiorari was limited to questions 1 and 2.

[http://www.supremecourt.gov/qp/15-00105qp.pdf]

Southern Nazarene University v. Burwell, 794 F.3d 1151 (10th Cir. 2015):

Whether the alternative means for nonprofit religious employers to comply with the ACA's contraceptive-coverage Mandate alters *Hobby Lobby's* substantial-burden analysis or identification of a free exercise violation under RFRA.

[http://www.supremecourt.gov/qp/15-00119qp.pdf]

D.C. Circuit

Priests for Life v. Department of Health and Human Services, 772 F.3d 229 (D.C. Cir. 2014) presented one question:

The question presented is whether the contraceptive services mandate of the Affordable Care Act as applied to non-exempt, nonprofit religious organizations violates the Religious

Freedom Restoration Act of 1993 (RFRA), 42 U S C §§ 2000bb, *et seq* [http://www.supremecourt.gov/qp/14-01453qp.pdf]

Roman Catholic Archbishop of Washington v. Burwell, 772 F.3d 229 (D.C. Cir. 2014) presented one issue:

> Whether the Religious Freedom Restoration Act ("RFRA") allows the Government to force objecting religious nonprofit organizations to violate their beliefs by offering health plans with "seamless" access to coverage for contraceptives, abortifacients, and sterilization.

[http://www.supremecourt.gov/qp/14-01505qp.pdf]

II. QUESTIONS ON WHICH CERTIORARI WAS GRANTED

In the two opening briefs for the petitioners, the questions presented were revised somewhat from the questions presented in their petitions, primarily to adapt to the limitations on the grant of certiorari by this Court, identified in the notes *supra*.

For petitioners in Nos. 14-1418, 14-1453, and 14-1505, the questions presented are:

> 1. Whether the Government violates the Religious Freedom Restoration Act ("RFRA") by forcing objecting religious nonprofit organizations to comply with the HHS contraceptive mandate under an alternative regulatory scheme that requires these organizations to act in violation of their sincerely held religious beliefs.
>
> 2. Whether the Government can satisfy RFRA's demanding test for overriding sincerely held

religious objections in circumstances where the Government itself admits that overriding the religious objection may not fulfill its regulatory objective—namely, the provision of no-cost contraceptives to objectors' employees.

For petitioners in Nos. 15-35, 15-105, 15-119, and 15-191, the questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection may not fulfill its regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees?